

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT AYERS DaSILVA,

Petitioner,

v.

STATE OF WASHINGTON and PIERCE
COUNTY,

Respondents.

CASE NO. C07-5491BHS

ORDER DENYING
CERTIFICATE OF
APPEALABILITY

This matter comes before the Court on Petitioner's Motion for Issuance of Certificate of Appealability for Appeal (Dkt.12). The Court has reviewed the relevant documents and the record herein.

PROCEDURAL HISTORY

On September 24, 2007, U.S. Magistrate Judge J. Kelley Arnold issued a Report and Recommendation, concluding that Petitioner's habeas petition is time barred, unexhausted, and procedurally barred and that Petitioner's coram nobis petition was not ripe because Petitioner had not fully served his sentence. Dkt. 7. On November 8, 2007, the Court adopted the Report and Recommendation and dismissed the habeas petition with prejudice and the coram nobis petition without prejudice. Petitioner has now appealed to the U.S. Court of Appeals for the Ninth Circuit by filing his Notice of Appeal on December 3, 2007 (Dkt. 12). The court will construe a notice of appeal of a final order in a habeas proceeding or a proceeding under 28 U.S.C. § 1155 as a petition for a certificate of appealability under 28 U.S.C. § 2253.

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

The district court should grant an application for a Certificate of Appealability only if the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. §

1 2253(c)(3). To obtain a Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas
2 petitioner must make a showing that reasonable jurists could debate whether, or agree that, the
3 petition should have been resolved in a different manner or that the issues presented were
4 adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 120 S. Ct. 1595,
5 1603-04 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). When the court
6 denies a claim on procedural grounds, the petitioner must show that jurists of reason would find
7 it debatable whether the petition states a valid claim of the denial of a constitutional right and
8 that jurists of reason would find it debatable whether the district court was correct in its
9 procedural ruling. *Slack v. McDaniel*, 120 S. Ct. at 1604.

10 DISCUSSION

11 This Court dismissed for the reasons that the habeas petition is time barred, the Petitioner
12 has not exhausted his state court remedies, and the petition is procedurally barred. The Court
13 also dismissed the coram nobis petition as petitioner has not fully served his sentence. There is
14 nothing in the record that would support a conclusion that jurists of reason would find it
15 debatable whether the petition states a valid claim of the denial of a constitutional right and that
16 jurists of reason would find it debatable whether this Court was correct in its procedural ruling.
17 Therefore, the Certificate of Appealability should be denied.

18 ORDER

19 Accordingly, it is hereby **ORDERED** that petitioner's motion for a Certificate of
20 Appealability (Dkt. 12) is **DENIED**.

21 DATED this 21st day of December, 2007.

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25 BENJAMIN H. SETTLE
26 United States District Judge
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